

THE POWER TO PROSECUTE TAX OFFENCES: A CRITIQUE OF UNIPETROL NIGERIA PLC V. EDO STATE BOARD OF INTERNAL REVENUE

By

Abiola Sanni*

Introduction

No tax payer has been successfully prosecuted for tax evasion in Nigeria.¹ This is largely because tax authorities at the federal and state levels prefer to institute civil actions to recover any tax due with interest and penalty ostensibly with the aim of meeting their revenue target.² However, there is an emerging trend whereby the Federal Inland Revenue Service (FIRS) and a few States are beginning to show interest in tax prosecution. The recent decision of the Supreme Court in *Unipetrol Nigeria Pic v. Edo State Board of Internal Revenue*³ (*Unipetrol's Case*) presented the first opportunity for the Supreme Court to pronounce on the capacity of a tax authority to prosecute tax offences in its name. In that case, the Supreme Court held that the Edo State Board of Internal Revenue could institute a criminal action in its name by virtue of section 4(2) of the erstwhile *Income Tax Law, Laws of Bendel State, 1976*,⁴ applicable in Edo State, which vested the Board with power to sue and be sued.

The power to prosecute has generated a number of cases⁵ and robust literature in academic circles,⁶ but not a whimper has been heard about the decision in *Unipetrol's Case* since 2006 when it was delivered

* Abiola Sanni: Ph.D., LL.M., FCTI, Senior Lecturer, Faculty of Law, University of Lagos. E-mail: asanni@abiolasanniandco.com.

¹To the best of knowledge of this writer, there is no such reported case tax evasion in Nigeria. Most of the prosecutions are usually for forgery of tax clearance certificate brought under section 473 of the Criminal Code Act Cap C.28 Laws of the Federation of Nigeria on forgery, thus cannot be regarded as a tax offence. Also, there is no known case of a high profile personality or celebrity who has been committed for offence of tax evasion as is common in developed countries. In United States and Europe, courts have found public figures guilty of tax fraud and ordered them to pay back taxes and penalties, as well as time in confinement to serve as deterrent to others. For instance, the following celebrities have been convicted of tax evasion: Boris Becker, Martha Stewart, Wesley Snipes, Willie Nelson, Nicolas Cage, Marc Anthony, Annie Leibovitz, Darryl Strawberry, Richard Hatch, Fleiss: See "10 Celebrities Convicted of Tax Evasion". Available online at <http://www.legalzoom.com/legal-headlines/celebrity-laws-celebrities-convicted-tax>. Site visited on 29th September, 2011.

²For example, section 34 (1) Federal Inland Revenue (Establishment) Act, No. 13 of 2007 provides that "any amount due by way of tax shall constitute a debt due to the Service and recovered by a civil action brought by the Service"; that is the Federal Inland Revenue Service. It is also instructive to note section 48 (1) Act which permits the Service to "compound any offence under this Act by accepting a sum of money not exceeding the maximum fine specified for the offence".

³(2006) 8 NWLR (Pt. 983) 624; (2006) CLR 28. References in this work will be as in CLR.

⁴Cap.71, Vol III.

⁵ See *State v. Ilori* [1983] All NLR, 84, [1983] 1 SCNLR 94; *Ibrahim v. The State* (1996) 1 NWLR (Pt. 18) 651; *Abacha v. The State* (2002) 11 NWLR (Pt.779) 437; *Federal Republic of Nigeria v. Osahan* (2006) 5 NWLR (Pt 973) 361.

⁶For a scholarly discussion of the power of the Attorney-General see generally, Nwadialo, F.: *The Criminal Procedure of the Southern States of Nigeria*, 2nd ed. (Lagos: MIJ Publishers, 1987) 368-370; Doherty O.: *Criminal Procedure in Nigeria*, 1st ed. (London: Blackstone Press Limited, 1990) xx; Ajayi, K.: "Revisiting Police Power to Prosecute: A Critique of *Federal Republic of Nigeria v. George Osahan & 7 Ors.*", *The Appellate Review*, Vol 1, No.1,

by the Supreme Court.⁷This paper is an attempt to analyse the implications of the decision in *Unipetrol's Case* against the background of existing authorities in Nigeria on the power to prosecute.

Facts of the Case

The Appellant was charged before the Mobile Revenue Court of Edo State with a two count charge of refusal to pay outstanding Pay-As-You-Earn (PAYE) and Withholding Tax to the Respondent contrary to section 51 of the *Income Tax Law, Laws of Bendel State, 1976*,⁸applicable in Edo State.

The charge was filed by a State Counsel in the Edo State Ministry of Justice, howbeit, in the name of the Respondent. The Appellant filed a preliminary objection to the action on the ground that the charge was defective and incompetent. The trial Judge dismissed the preliminary objection. The Appellant appealed to the Court of Appeal I which also dismissed his appeal. Being dissatisfied, the Appellant further appealed to the Supreme Court.

It is not in dispute that the Respondent is a creation of statute. Section 4 (1)(b) of the *Income Tax Law, Laws of Bendel State, 1976*,⁹applicable in Edo State provides:

There shall be established for the State in accordance with provisions of this law a Board to be known as the Tax Board.

The Law goes on to provide in subsection (2) that:

The Board shall have power to sue and be sued in its official name and to acquire, hold and dispose of movable and immovable property for the purposes of its functions under this law.¹⁰

Issue and Arguments

The sole issue for determination was whether the Respondent could validly undertake the criminal charge in its corporate name rather than that of the Attorney-General.

The Appellant advanced two arguments in support of its contention that the charge is incompetent. The first was on the meaning of the word "*sue and be sued*" and second was on the competence of the charge preferred in the name of the Respondent instead of the Attorney-General. The Appellant submitted that the phrase "sue and be sued" in section 4 (2)(a) of the *Income Tax Law, Laws of Bendel State, 1976*¹¹ connotes civil responsibility and gave examples of the provisions of the *Companies and Allied Matters Decree*,¹² 1990 and the *University of Benin Act*¹³ which contained the same phrase. The

2009, 67, Omoregie, E.B.: "Power of the Attorney-General over Public Prosecution Under the Nigerian Constitution: Need for Judicial Restatement", *The Appellate Review*, Vol 1., No.1, 2009, 135.

⁷The judgment was delivered on 7th April, 2006.

⁸*Supra* note 4.

⁹*Ibid*

¹⁰Emphasis supplied.

¹¹*Supra* note 4.

¹²No.1, 1990, Cap. C20, Laws of the Federation of Nigeria (LFN) 2004.

¹³Cap. 452 Laws of the Federation of Nigeria, 1990; now Cap. U4, LFN 2004.

Appellant pointed out that if the interpretation of the phrase by the High Court and the Court of Appeal is allowed undisturbed, it will follow that all corporate entities would be able to prosecute criminal matters in their names. The Respondent on its part argued that being a juristic person, the Respondent can sue and be sued in its corporate name. Reliance was placed on the cases of *Cooperative Bank Ltd v. Samuel Okekhare & 2 Ors*¹⁴ and *Yesuj v. Adewusi Brothers and Co.*¹⁵

On whether a State Counsel can prosecute in the name of the Respondent, the learned counsel for the Appellant contended that the Constitution of the Federal Republic of Nigeria, 1979, empowered only the Attorney-General to initiate and undertake criminal proceedings against any person before any court of law in Nigeria. Consequently, a State Counsel has no power to prosecute charges in the name of incompetent persons. In reply, the Respondent argued that although the Attorney-General is constitutionally empowered to sue and be sued on behalf of the State, the Attorney-General can exercise the power either directly or through officers of his Ministry. Relying on the case of *M.U.D. Ezomo v. AG of Bendel State*¹⁶ the Respondent submitted that the charges filed by a State Counsel were competent, valid and in compliance with the provisions of the *Edo State Mobile Revenue Court Edict*.¹⁷ He also placed reliance on the cases of *The State v. Ilori*¹⁸ and *Ibrahim and Anor. v. The State*.¹⁹

Decisions

Upholding the argument of the Respondent, the Supreme Court held that the phrase "sue and be sued" is wide enough to include civil and criminal actions. The Court further upheld the charges filed by the Respondent in its corporate name on the basis that it was lawful for the Attorney-General to delegate his powers to officers of his department under section 174 (1)(c) of the Constitution.

The statements of Mukhtar, JSC who read the lead judgment are hereby reproduced *in extenso* in order to decipher the *ratio decidendi*. According to the learned Justice:

... the Respondent derived its existence from section 4(1) of the Income Tax Law (*supra*). A thorough understanding of these provisions confirms that the respondent could take any action, be it civil or criminal. In this respect, I cannot fault the following finding of the lower court which reads thus:

I do not think I can agree with the construction or meaning placed on the Word 'sue' in section 4(2) of the Income Tax Law by learned counsel for the Appellant. Even going by *Black's Law Dictionary* definition of the word as indicated by learned counsel, both 'sue' and 'prosecute' cover an action. It is a common denominator in both Words. An action could be civil or criminal, it cannot be only civil.²⁰

¹⁴(1996) 8 NWLR (Pt.468) 581.

¹⁵(1991) 7 NWLR (Pt. 201) 4.

¹⁶(1986) 4 NWLR (Pt. 36) 448.

¹⁷No.1 of 1995.

¹⁸(1983) 1 SCNLR 14.

¹⁹(1986) 1 NWLR (Pt. 18) 650.

²⁰(2006) CLR 28 at 35, 1.

The learned Justice went further to say that:

It is instructive to note that section 51 of the said Income Tax Law throws some light on the provision of section 4 of the same law and it is definitely of assistance in this discussion. Section 51 provides as follows: 51(1) Any person guilty of an offence against this law, or any person who contravenes or fails to comply with any provisions of this law or any rule made there under for which no other penalty is specifically provided, shall be liable on conviction to a fine of Four Hundred Naira, and where such offence is the failure arising from the provisions of Part 4 to furnish a return, statement or information or to keep records required, a further sum of ten Naira for each and every day during which such failure continues, and in default of payment to imprisonment for six months ...

The above provision reinforces the fact that actions that may be initiated are not confined to civil *ones per se*. As a matter of fact, a careful perusal of the provision with the use of the words 'guilty', 'conviction' and 'imprisonment' etc, should satisfy anyone that actions predicated on criminality are involved. It is instructive to note that the charge framed against the Appellant which I have already reproduced above, was brought pursuant to the said section 51(2)(b) of the *Income Tax Law*.”²¹

On the competence of the charges filed by the Law Officer in the name of the Respondent, the learned Justice has this to say:

I subscribe to this latter argument, for the Attorney-General of a State has the power to delegate his powers to officers of his Ministries (Ministry of Justice) to prosecute and defend matters in court on his behalf, be it criminal or civil, in the circumstances, I hold that the action in the present case is competent and so is the charge framed.²²

Analysis

A close reading of the Supreme Court's decision in *Unipterol's Case* will reveal that the Court did not decide that being a legal person *simpliciter* confers power to prosecute an offence in the name of a corporate person, Of course, such a decision would be troubling and open a floodgate of prosecutions by any corporate person in its own name as rightly argued by the Appellant. The decision would have upset a well settled public policy and legal order which makes the Attorney-General and the Police, the defender of the state against crimes (regarded as injuries or wrongs against the public and not individuals), If the intention of the apex Court had been to establish a new paradigm in this regard, it is reasonable to expect some specific comments on the inadequacy or otherwise of the existing principles and what informed a departure, In effect, one would have expected the Supreme Court to do a robust analysis of the groundswell authorities²³ on the nature and extent of the power of the Attorney-General to prosecute.

²¹*Ibid*, at 35-36; emphasis supplied.

²²*Ibid*. at 36.

²³*Supra* note 6.

A close reading of the decisions in *Unipetrol's Case* reveals that the learned Justices placed reliance on section 51 of the *Income Tax Law*,²⁴ Thus, it will be hollow for any corporate person to seek to prosecute an offence in its corporate name on the authority of this case in the absence of any specific statutory provisions similar to that of section 51 of the *Income Tax Law*.

However, it is the view of this writer that the reliance of the Supreme Court on section 51 of the Income Tax Law is misconceived. The provision is totally irrelevant to the determination of the question whether the particular charges brought pursuant to the section were competent having been preferred in the name of the Respondent instead of the Attorney-General. A literal interpretation of section 51 will reveal that it is a general or omnibus penalty provision for any infraction of the provisions of the Personal Income Tax Law for which no specific penalty was provided. While the provision undoubtedly reinforces the point that a taxpayer can be tried and convicted for infraction of the provisions of the Personal Income Tax Law, it is irrelevant for the determination of the question whether the prosecution should be at the instance of the Attorney-General or the Respondent. The Supreme Court's reliance on the provisions of section 51 is an indication that it has confused the question "whether a charge filed by a State Counsel in the name of the Respondent is valid" with "whether the Appellant can be prosecuted under the Income Tax Law."

To this extent, the decision of the Court can be faulted as being off the mark!

Furthermore, the same can be said concerning the decision of the court on whether a State Counsel can prosecute in the name of the Respondent rather than the name of the Attorney- General. To our mind, the Appellant did not challenge the *locus standi* of the State Counsel who filed the charges but his competence to do so in the name of the Respondent. Section 211 (2) of the 1999 Constitution of the Federal Republic of Nigeria expressly provides that:

"The powers conferred upon the Attorney-General of a State under subsection 1 of this section may be exercised by him in person or through officers of his department." The provisions have been given judicial elaboration by the Supreme Court in *Ibrahim v. The State*,²⁵

Thus, it is beyond any question whether the Constitution expressly authorises the Attorney-General to delegate his authority under section 211(1) to officers of his department.

The question is whether this provision is wide enough for an Attorney-General to sue or authorise officers of his department to prosecute in either their personal names or that of any other persons than the office of the Attorney- General or the State? The answer, to our mind, is in the negative. It is difficult to find any justification for why an Attorney-General when acting in his official capacity will prefer to file a charge (on behalf of the State) in his personal name rather than in the name of his office or that of the State! Therefore, the resolution of the competence of the charges simply on the basis that the Attorney-General has power to delegate his power to his officers misses the point. Accordingly, the authorities

²⁴*Supra* note 4.

²⁵ *Supra* note 5. The case is considered below.

cited by the Supreme Court in support of its decision on this score are inapplicable and irrelevant to the just determination of the issue.

The Attorney-General is the Chief Law Officer of the Federation or State.²⁶ When the Attorney-General acts by virtue of his office, he does so on behalf of the Federation or State as the case may be. It follows therefore that when an Officer of the Office of the Attorney-General prefers a charge in court under a delegated authority of the Attorney-General, he or she does so on behalf of the State or the Office of the Attorney-General. This explains why charges are customarily filed in the name of the State or the Attorney-General irrespective of whether the Attorney-General is prosecuting in person or through the Officer of his Department.²⁷ It is on this basis that the Appellant has challenged the particular charge in *Unipterol's Case* as incompetent.

By filing the charges in the name of the Respondent, it is arguable that the State Counsel who acted in this particular case could not have intended to act on behalf of the Office of the Attorney-General. In practice, staff of the Office of the Attorney-General are posted to act as legal advisers to various ministries and government agencies including that of the Respondent. This, however, is not enough to grant the authority to such Officers to prefer charges in the name of various agencies where they are posted. What is more, that a statute creates an offence is not sufficient to vest in a body created by the statute the power to prosecute. The power to prosecute has to be specifically provided for in the statute and cannot be implied from the general power conferred on the agency to administer the statute. In recognition of this, section 47 of the Federal Inland Revenue Service (Establishment) Act²⁸ expressly provides that the "Service shall have powers to employ its own legal officers who shall have powers to prosecute any of the offences under this Act subject to the powers of the Attorney-General of the Federation."²⁹ In the absence of such an express provisions, it is submitted that the FIRS would have been bereft of any prosecutorial power.

The pre-eminent and incontestable position of the Attorney-General under the Common Law, as the Chief Law Officer of the State, either generally as a legal adviser or specifically in all court proceedings to which the State is a party, has long been recognised by the courts. In *Ilori v. State*,³⁰ the Director of Public Prosecutions of Lagos State filed an Information on 26th October, 1978 to prosecute the Respondent. The Respondent's application to quash his indictment was upheld by the (Federal) Court of Appeal.

²⁶See "Powers of the Nigerian Attorney-General in perspective, available at < WWW.NIGERIANLAWGURU.COM... IPOWERS%20F%20THE%20NIGERIAN%20ATTORNEY-GENE>, Site visited on 1st June 2011.

²⁷*State v. Messrs Taxpayer, Attorney-General v. Messrs Taxpayer or Director of Public Prosecutors v Messrs Taxpayer.*

²⁸No.13 of 2007.

²⁹Prosecutorial powers were specifically vested in other agencies. See section 26(1) of *National Agency for Food and Drug Administration and Control Act*, Cap N1, LPN, 2004, section 180 of *Customs and Excise Management Act*, Cap C45, LPN 2004, section 6(m) of *Economic and Financial Crimes Commission Act*, Cap E1, LFN, 2004 and section 61 of *Independent Corrupt Practices and Other Related Offences Commission, Act No.5, 2000*, as amended (ICPC Act) was inexplicably omitted in the LFN 2004 compilation).

³⁰*Supra* note 5.

Consequently, the Respondent wrote a letter to the Attorney-General of Lagos requesting for the prosecution of the DPP and two police officers for the offences of conspiracy to bring false accusations and to injure his trade by maliciously procuring seizure and detention of the properties of his clients. The Attorney-General of Lagos declined to accede to the request of the Respondent. The Respondent thereupon decided to initiate a private prosecution against the DPP and two Police officers.

Following the action, the Attorney-General filed a *nolle prosequi* in the action. Relying on section 191(3) of the 1979 Constitution,³¹ the Respondent challenged the propriety of the *nolle prosequi*. The Supreme Court held that section 191(3) of the 1979 Constitution has in no way altered the power of the Attorney-General to enter *nolle prosequi*. At common law and under the pre-1979 Constitution, the Attorney-General is a master unto himself and is under no control whatsoever, judicial or otherwise *vis-a-vis* his powers of instituting or discontinuing criminal proceedings. In *Federal Republic of Nigeria v. Ikpe*,³² following *State v. Ilori*³³ the Federal High Court held that the Attorney-General is a law to himself and subject to no direction and control of no one in the exercise of his powers to prosecute offences. He is an agent of the Government and the court cannot control him in the exercise of the power so conferred on him.

As far as back as 1986, the power of the Attorney-General to delegate all his powers to officers of his department has been firmly established by the Supreme Court. In *Ibrahim v. The State*,³⁴ the Appellants were tried and charged on an information for arson, willful damage, stealing and forgery in Ondo State High Court. The information was signed by a Senior State Counsel on behalf of the State's Director of Public Prosecutions pursuant to the State's *Legal Notice No.4 of 1980* dated 11th March, 1980 in which the Attorney-General of Ondo State delegated his powers under section 191 of the 1979 Constitution to the "Deputy Director of Public Prosecutions and all grades of State Counsel in the Department of Public Prosecutions".

The Appellant challenged the constitutionality of the Legal Notice. Although the Justices considered the scope of the delegation to be too wide, citing *State v. Ilori*,³⁵ the Supreme Court upheld the constitutionality of the Legal Notice. It was held that the Attorney-General can make a general or specific delegation. He has an absolute discretion under section 191(2) of the Constitution.

Eso JSC (as he then was) who read the lead judgment had this to say:

It is true that one may criticize the exercise of delegation as contained in the authorization of the Attorney-General for it is rather too wide - being extended even to "all grades of State Counsel in the Department" and would leave that Attorney-General with practically nothing to do personally under all important provisions of s.191 of the Constitution. But the power is in him and if the appointor is satisfied with such apparently lazy Attorney-General it is only unfortunate, but legally and constitutionally valid.

³¹Now sections 174 & 211 of the Constitution of Federal Republic of Nigeria, 1999.

³²*Quarterly Criminal Cases Reports* April-June (2005) 1.

³³*Supra* note 5.

³⁴*Supra* note 5.

³⁵*Supra* note 5.

Uwais, JSC (as he then was) also remarked as follows in his concurring judgment:

Such delegation had never happened before in the legal history of this country. ... The powers ... have now ridiculously been extended by the Attorney-General of Ondo State to sundry legal officers, including inexperienced state counsel, once they get assigned to the Department of Public Prosecution. Apart from anything else, the action of the Attorney General is therefore retrogressive.

However, in *Abacha v. The State*,³⁶ the Supreme Court exercised the power of judicial review over the Attorney-General of Lagos State's discretion to file an Information against the Appellant pursuant to section 211 of the 1999 Constitution. On 4th June 1996, Alhaja Kudirat Abiola, wife of Chief M.K.O. Abiola was gruesomely murdered in Lagos during the military rule. Three years later in 1999, after the cessation of military rule, the Appellant, son of the late military President, General Sani Abacha, and three others were arrested for the murder. The Attorney-General, Lagos State, through the State Director of Public Prosecution (DPP) filed Information against the Appellant and three other suspects. Essentially, the charges contained in the Information were for murder, conspiracy to commit murder and accessory after the fact to murder, contrary to sections 324, 319(1) and 322 respectively of the *Criminal Code*. In preferring the Information, the Attorney-General expressly stated that he was acting pursuant to the power conferred on him by section 211(1) of the Constitution of the Federal Republic of Nigeria, 1999.

When the Information came up at trial at the Lagos High Court, the Appellant moved that the indictment against him be quashed on the ground, *inter alia*, that the statement of the offences disclosed in the Information were prejudicial to his right to fair hearing. In refusing the Appellant's application at the High Court, the trial Judge among other things, upheld the Information, on the ground that it was without procedural defects. Dissatisfied, the Appellant appealed to the Court of Appeal, which court, while dismissing the appeal, held that the Appellant had taken a premature step of challenging the indictment when he could at a later stage make a *no case submission*.

Still dissatisfied, the Appellant appealed to the Supreme Court. The Supreme Court held, *inter alia*, that the charge against the Appellant was based on suspicion as no linkage was shown that the Appellant knew what was being planned by what he did or said at the relevant occasion. The Court further held that an accused person, despite the power of the Attorney-General of a State to file indictment on information, should not be indicted to face trial, which from the outset, he should not face. In his leading judgment, Belgore J. S. C (as he then was) said:

All power to settle issue between parties is vested in courts and courts must be vigilant that genuine issue and controversies are settled so that no accused person will be oppressed either directly or through act of prosecution. It is for this reason that an accused person, despite the

³⁶*Supra* note 5.

power to file indictment on an information, should not be indicted to face trial that from the outset, it was clear he should not face.³⁷

In *FRN v. Osahon*,³⁸ the Police charged the Respondents with various counts of offences under the *Miscellaneous Offences Act*, 1989 and commenced criminal proceedings against them without a fiat or any authority from the Attorney-General of the Federation (AGF). By a motion, the Respondents prayed the High Court to quash the charges on the grounds that the Police were incompetent to institute the proceedings against them by: virtue of section 174 (1) (a) Constitution of the Federal Republic of Nigeria (CFRN), 1999 and that it was only the AGF personally or through the officers of his Department that could institute criminal charges against them. They contended that the prosecuting police officers did not come within the ambit of Law Officers, State Counselor Legal Practitioners authorized by the Attorney-General of the Federation as stipulated in section 56(1) of the Federal High Court Act nor fall within the purview of section 3 of the *Law Officers Act*, and as a result, the police officers lacked the authority to prosecute the matter.

After hearing the submission of counsel, the trial court overruled the objection of the Respondents and held that the police officers had the authority to initiate and prosecute the charge. Aggrieved, the Respondents as Appellants appealed to the Court of Appeal which allowed the appeal and quashed the charges against the Appellants/Respondents. Aggrieved by the Court of Appeal decision, the Prosecution as Respondents appealed to the Supreme Court. By a majority decision, the Supreme Court allowed the appeal. In arriving at their decision, the majority of the Court construed the provisions of section 174 (a)-(c) CFRN 1999 and held that the section empowered the Police to institute criminal proceedings in any court in Nigeria. In interpreting the phrase "any other person or authority" in section 174 (1) (b) CFRN 1999, the Court held that the phrase was wide enough include the Police. It further held that the powers of the Attorney-General of the Federation under section 174(1)(a) CFRN 1999 to institute criminal proceedings in any court of Nigeria was available to "any other person or authority," subject to the powers of the Attorney-General to take over, continue or discontinue before judgment any such proceedings begun by "any other person or other authority". Furthermore, the Court held that, though the Police Act did not create any dichotomy between legal practitioners who were Police officers and Police officers who were not legal practitioners, the Police might, through its officers who were legal practitioners, institute criminal proceedings.

Conclusion

Arising from the foregoing, the earlier cases on the prosecutorial powers of the Attorney-General relate to the propriety of exercise of the power to either prosecute or enter *nolle prosequi*. None of these cases is directly applicable to the case of *Unipetrol* where a Legal Officer in the Office of the Attorney-General of Edo State erroneously filed a charge in the name of Edo State Board of Internal Revenue (the Respondent) rather than that of the Attorney General. The *Unipetrol Case* has thus introduced a new twist to the controversy on the extent of the power of the Attorney-General in Nigeria. Although the

³⁷*Supra* note 5, at 248-249.

³⁸*Supra* note 5.

issue was rightly identified by the parties and the Supreme Court, it was never addressed by all the learned Justices in their decisions.

The Court was pre-occupied with the issue of delegation of the Attorney-General's power to prosecute. Rather than answer the question whether a charge filed in the name of the Respondent was competent, the focus of the Justices was whether the Appellant can be prosecuted under the *Income Tax Law*. In our view, if due consideration had been given to the main issue, the Appellant's objection to the charge ought to have been sustained. Really, the Respondent did not present any argument other than saying that being a body corporate, it is statutorily vested with power to sue and be sued.

A cursory reading of the decision in *Unipetrol* might therefore suggest that every corporate person having power to sue and be sued can prefer a charge and prosecute offence(s) in its name. Such a conclusion will be misleading as the decision was anchored on section 51 of the *Income Tax Law of Bendel State*. It has been submitted, however, that section 51(1) of the *Income Tax Law* has no bearing on the issue in question. Therefore, it will be futile for any corporate person to seek to prosecute an offence in its corporate name on the authority of this case. What is more, the Respondent is an agency of the State established under a Law which makes it *sui generis*, compared to companies.

The attempt to prosecute a corporate body for an offence of tax evasion in *Unipetrol's Case* is quite bold and commendable. However, there is no doubt that such a development poses great challenges for both taxpayer and tax authority. It is imperative for the tax authority to ensure that due process is followed in all ramifications in the expectation that taxpayers will naturally seek to exploit all available defences that may stall the prosecution. Notwithstanding the decision in *Unipetrol's Case*, it is better in our view to err on the side of caution by ensuring that charges are filed in the name of the Attorney-General or the State. One would expect the Appellant to have been re-arraigned and prosecuted on fresh charges; otherwise it would have successfully leveraged on a procedural error (on the part of the Respondent) to either delay or avoid payment of any tax that might have been due.